(21) (20)

Nos. 86-179 and 86-401

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
and
THE UNITED STATES OF AMERICA,
Appellants,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeals from the United States District Court for the District of Utah

BRIEF OF THE EMPLOYMENT LAW CENTER OF THE LEGAL AID SOCIETY OF SAN FRANCISCO AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS

The Employment Law Center, the principal project of the Legal Aid Society of San Francisco, is nationally recognized for its expertise regarding state and federal laws prohibiting employment discrimination. It has pioneered the employment field for over a decade. It focuses on legal problems of disadvantaged people as they seek to secure and retain employment and represents those who find opportunity denied them for reasons other than their ability to do the job.

The Employment Law Center relies on community education, persuasion and, where appropriate, litigation to achieve its goals. Its expert staff are in demand as speakers; its newsletters reach over 5000 employers, employees, public policy makers and advocacy groups; and its attorneys are regularly consulted on

employment issues by other lawyers. The Employment Law Center also produces informational materials regarding equal opportunity laws which protect minorities, women and the disabled, including more recently victims of AIDS or ARC and cancer survivors. These publications have been requested by hundreds of public and private employers as well as the public.

In light of the expertise it has developed, the Employment Law Center also takes on difficult appeals and writes amicus briefs in significant cases. For example, the Employment Law Center has submitted amicus briefs to this Court in School Board of Nassau County, Florida, et al. v. Gene H. Arline (No. 85-1277), Atascadero State Hospital, et al. v. Douglas James Scanlon (No. 84-351), California Federal Savings and Loan Association, et al. v. Mark Guerra, Director, Department of Fair Employment and

Housing, et al. (85-494), Wygant v. Jackson Board of Education (No.84-1340), Board of Directors of Rotary International, et al. v. Rotary Club of Duarte, et al. (No. 86-421), Fort Halifax Packing Company, Inc. v. P. Daniel Coyne, Director, Bureau of Labor Standards, Maine Department of Labor, et al. (No. 86-341), and Meritor Savings Bank, FSB v. Vinson (No. 84-1979). As an organization concerned with securing full equality in employment opportunities whether the employer is the government, private-for-profit corporations, non-profit or religious organizations, the Employment Law Center has a strong interest in this case, and respectfully submits this brief in support of Appellees.

SUMMARY OF THE ARGUMENT

This action presents questions of substantial legal complexity with broad policy implications for religious

organizations, and, of particular concern to amicus, employees of such organizations. This Court is asked to decide whether the Constitution permits exemption for religious organizations from the generally applicable statutory prohibition against religious discrimination in secular employment. The parties will undoubtedly present the issues for decision fully and competently, and amicus does not intend to repeat the arguments they presented to the District Court. Rather, amicus offers this brief to provide the Court a workable analysis with which to scrutinize statutes that purport to accommodate religion and religious organizations.

Amicus submits that the Establishment Clause jurisprudence developed over the past 15 years should not be discarded in cases addressing the validity of accommodations of religion; the legal doctrines historically applied by

this Court provide a sound framework for deciding the constitutionality of such statutes. To be sure, if the test articulated by this Court in Lemon v. Kurtzman, 403 U.S. 602 (1971), is applied woodenly to such provisions, demonstrably incorrect results may occur. Conversely, if the Lemon test is applied in a manner informed by previously developed constitutional principles, accommodation cases may be resolved consistent with the Court's other Establishment Clause decisions.

Our focus is on the first and second prongs of the Lemon test, which require that Section 702 (1) "have a secular legislative purpose," and (2) have a "principal or primary effect . . . that neither advances nor inhibits religion." Id. at 612. Section 702 meets neither requirement.

In applying Lemon's first prong, this Court has recognized that governmental attempts to accommodate religion by removing government-imposed impediments to religious belief or practice are secular in purpose because they promote the constitutional value of free exercise. Although the Court has never insisted that such accommodations be required by the Free Exercise Clause (see Walz v. Tax Commission, 397 U.S. 664, 674 (1970)), it has rejected claims of "accommodation" where the government-provided benefit to religion does not directly advance free exercise of religious belief. See Wallace v. Jaffree, 472 U.S. 38, 57-58 n.45 (1985). Section 702, as it relates to secular employees, is not a permissible religious accommodation because, definitionally, it removes no impediment to the free exercise of religious practice or belief. Hence

Section 702 has no permissible secular purpose and is unconstitutional.

Section 702 also fails under Lemon's second, effects test. Members of this Court and others have expressed unease with application of the effects test to accommodation cases because the "effect" of a true accommodation will always be to "advance" religion. But this valid observation does not justify ignoring the effects of accommodations altogether. Lemon also requires that government acts not have the effect of inhibiting religion. Moreover, this Court has long condemned statutes with the effect of advancing certain religions or religious beliefs at the expense of others.

Section 702 "accommodates" some religions (to the extent it does so at all) only by inhibiting the religious freedom of their secular employees. Such an "accommodation" clearly runs afoul of the

Establishment Clause and is particularly repugnant in light of the strong national policy to eliminate religious employment discrimination. Section 702 has the additional unconstitutional effect of advancing established, wealthy religions over less-established, unorganized, or economically unendowed sects. Section 702 gives wealthy religious organizations a tool to spread doctrine and expand membership that other religions simply do not possess, and may be prohibited by their doctrine from acquiring. Such an effect goes far beyond mere "disparate impact," for it touches on the very core concern of the Establishment Clause -- government neutrality toward competition among religious sects.

ARGUMENT

The topic of how to treat statutory provisions that seek to accommodate religion has received substantial attention from commentators and this Court in recent years. An "accommodation" is defined as an effort by the State to promote the free exercise of religion by exempting religious groups from otherwise applicable governmental regulations. See Wallace v. Jaffree, 472 U.S. 38, 57-58 n.45 (1985); id., 472 U.S. at 83 (O'Connor, J., concurring). So defined, there have been a number of cases in which the Court has addressed the constitutionality of religious accommodations under the Establishment Clause. See, e.g., Zorach v. Clausen, 343 U.S. 306 (1952) (allowing students to be released from public school to attend religious classes); Sherbert v. Verner, 374 U.S. 398, 409 (1963) (creating religious exemption from requirement that

recipient of unemployment benefits be willing to work Saturdays); Larson v. Valente, 456 U.S. 228 (1982) (exempting certain religious organizations from reporting requirements); Wisconsin v. Yoder, 406 U.S. 205, 234-35 n.22 (1972) (creating exemption from compulsory school attendance laws for Amish religion); Thomas v. Review Board, 450 U.S. 707, 719-20 (1981) (creating exemption from unemployment laws for individual who objects on religious grounds to munitions manufacturing).[1]

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1 In other cases addressing religious exemptions (see Brief for the United States at 20), the Establishment Clause issue was either not decided by the Court (Bowen v. Roy, ___ U.S. ___, ___ n.19, 106 S. Ct. 2147, 2158 n.19 (1986) (opinion of Burger, C. J.); United States v. Lee, 455 U.S. 252, 260 n.11 (1982); Braunfeld v. Brown, 366 U.S. 599, 608 (1961) (plurality opinion); Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979); St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981)), or the case did not involve a purely religious accommodation. Gillette v. United States, 401 U.S. 437 (1971) (exemption from (footnote continued)

From the decisions squarely addressing the Establishment Clause issue, certain fundamental principles have emerged. First, it is clear that where an accommodation is constitutionally required by the Free Exercise Clause, the State does not transgress the Establishment Clause by its enactment. See Sherbert; Yoder; Thomas. See also Catholic Bishop, 440 U.S. at 507 (statute construed to exempt religion in order to avoid potential conflict with the "Religion Clauses"). Moreover, the State may, under certain circumstances, exempt religion from governmental obligations even if such an exemption is not required by the Free Exercise Clause. Walz v. Tax Commission, 397 U.S. 664, 673 (1970). However, an accommodation that is not constitutionally

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military service for all conscientious objectors); Walz v. Tax Commission, 397 U.S. 664 (1970)(property tax exemption for all non-profit organizations).

required will violate the Establishment Clause if it has the effect of inhibiting religious belief (Sherbert, 374 U.S. at 409; Zorach, 343 U.S. at 311-12), or preferring certain religious sects over others (Larson, 456 U.S. at 244).

Reflecting the foregoing principles, and governing Establishment Clause jurisprudence generally, is the three-part test articulated by the Court in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under Lemon, in order to satisfy the requirements of the Establishment Clause, a statute must have a secular purpose, a primary effect that neither advances nor inhibits religion, and must not foster excessive government entanglement with religion. Lemon, 403 U.S. at 612-13. The Lemon test has been criticized by some members of this Court, particularly as applied to instances where the State purportedly seeks to accommodate the

religious practices or beliefs of certain groups by enacting religiously-based exemptions from general governmental obligations. Justice O'Connor has observed that "[b]y definition, such legislation [accommodating religion] has a religious purpose and effect in promoting the free exercise of religion." Wallace v. Jaffree, 472 U.S. at 82 (O'Connor, J., concurring). On the other hand, Justice Powell has noted that Lemon embodies "the only coherent test a majority of the Court has ever adopted." Wallace, 472 U.S. at 63 (Powell, J., concurring).

Amicus submits -- contrary to the argument of the Mormon Church and the implicit suggestion of the United States -- that there is no reason to abandon Lemon or to dilute its test in the context of accommodation cases. Rather, the test when viewed in light of the purposes of the Religion Clauses is well suited to

accommodation statutes. A statute that genuinely accommodates certain religious practices or beliefs should be construed as having a permissible purpose and effect, as long as it neither burdens the religious freedom of others, nor advances certain religious groups at the expense of others. So construed, application of Lemon leads to the conclusion that Section 702 constitutes an impermissible establishment of religion, and cannot be sustained.[2]

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2 In the event that an accommodation of religion has the effect of burdening the religious freedom of others, it may nevertheless be constitutional if required by the Free Exercise Clause. For example, it is arguable that the Free Exercise Clause demands that religious groups be allowed to discriminate on religious grounds in hiring clergy, and an exemption from Title VII limited to such circumstances would therefore not violate the Establishment Clause. By contrast, it cannot be maintained that an exemption from Title VII for non-religious employment is required to remove any impediment to the Free Exercise of religious practice or belief, a point which the United States apparently concedes. (Brief for the United States at 14.)

I. SECTION 702 IS NOT AN ACCOMMODATION BECAUSE IT DOES NOT PROMOTE THE FREE EXERCISE OF RELIGIOUS BELIEF

This Court has held that where the State exempts religion from otherwise generally applicable governmental regulations, and thereby seeks to accommodate the free exercise of religious practice or belief, such action does not necessarily transgress the Establishment Clause. See, e.g., Sherbert v. Verner, 374 U.S. 398, 409 (1963); Zorach v. Clausen, 343 U.S. 306 (1952). The reason that such provisions do not violate the "secular purpose and effect" requirements of Lemon is that when the state removes government-imposed obstacles to the unfettered practice of religion, it pursues the secular values inherent in the Free Exercise Clause of the First Amendment. See Wallace, 472 U.S. at 58 n.45.[3] See also,

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3 This is not to say that the only permissible (footnote continued)

Greenawalt, Religion as a Concept in Constitutional Law, 72 Cal. L. Rev. 753, 800 (1984) (accommodation "becomes more troublesome if a legislative body chooses to afford an exemption to persons who lack a free exercise entitlement to it").

Conversely, this Court has carefully refrained from sanctioning religious exemptions that do not remove any impediment to the free exercise of religion, but merely provide religion with a benefit not offered to a broader spectrum of secular groups. Thus, in Wallace, 472 U.S. at 58 n.45, the Court rejected the argument that Alabama's moment of silence law was a permissible accommodation, because it did not remove any government-

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accommodations are those required by the Free Exercise Clause; rather, the Court sometimes sanctions those accommodations that remove governmental obstacles to the free exercise of religious practice or belief, even if such accommodations are not constitutionally compelled.

imposed obstacle to the free exercise of religious practice or belief:

> In this case, it is undisputed that at the time of the enactment of [the statute in question] there was no governmental practice impeding students from silently praying for one minute at the beginning of each schoolday; thus, there was no need to "accommodate" or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the Free Exercise Clause.

Justice O'Connor similarly stated that only those exemptions that lift a governmental burden "on the free exercise of religion" qualify as genuine accommodations. Wallace, 472 U.S. at 83 (O'Connor, J., concurring) (emphasis added).

The reason for such a limitation is apparent; when the State removes an impediment to the exercise of religious practice or belief, the risk that a religiously-drawn classification will be

perceived as establishing religion is attenuated. Increasingly, this Court has recognized that such perceptions are of central importance in Establishment Clause analysis. For example, in Grand Rapids School District v. Ball, 473 U.S. 373, 105 S.Ct. 3216 (1985), the Court stated that

> an important concern of the effects test [of Lemon] is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices.

Ball, 473 U.S. at ___, 105 S.Ct. at 3226 (emphasis added). Similarly, in Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982), the Court struck down a delegation of governmental authority to religious institutions in part because it provided "a significant symbolic benefit to religion in

the minds of some by reason of the power conferred." Id. at 125-26.[4] The danger of a perceived establishment of religion is at its apex when governmental benefits or burdens are distributed using explicitly religious criteria, as in the case of Section 702, because such classifications are most likely to convey a message that the State is aiding or abetting religion.[5]

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4 One commentator persuasively argues that Establishment Clause jurisprudence may be understood exclusively by reference to whether state action creates the appearance of church-state unity. Marshall, "We Know It When We See It," The Supreme Court and Establishment, 59 So. Cal. L. Rev. 495 (1986).

5 Numerous decisions of this Court have recognized that statutory provisions drawn along exclusively religious lines present serious Establishment Clause concerns. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 220-221 (1972) (exemption "from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause"); Widmar v. Vincent, 454 U.S. 263, 274 (1981) ("[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect"); Mueller v. Allen, 463 U.S. 388, 397 (1983) ("[m]ost importantly, the [benefit] is available for educational expenses incurred by all parents,

(footnote continued)

Conversely, when the State removes an impediment to the free exercise of religious practice or belief, the perception will not be one of endorsement,

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(footnote continued from previous page) including those whose children attend public schools") (emphasis original); Walz v. Tax Commission, 397 U.S. 664, 673 (1970) (tax exemption granted to religious groups as well as "a broad class of property owned by nonprofit, quasi-public corporations"); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 518 n.11 (1979) (Brennan, J., dissenting) (an exemption "available only to church-operated schools, generates a possible Establishment Clause question of its own") (emphasis original); Committee for Public Education v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973) (suggesting that aid granted to religious schools might be constitutionally permissible if granted to broader spectrum of groups). See also Bagni, Discrimination in the Name of the Lord, 79 Col. L. Rev. 1514, 1547 (1979) (tax exemptions granted only to religious organizations would violate the Establishment Clause); Johnson, Concepts and Compromise in First Amendment Religious Doctrine, 72 Cal. L. Rev. 817, 878 (1984) (suggesting that Walz and Widmar may have reached different results if the benefits conferred had been narrowly directed at religion); Greenawalt, Religion as a Concept in Constitutional Law, 72 Cal. L. Rev. 753, 756-57 (1984) ("The 'suspectness' of religious classifications did not have to await judicial creativity; it has always been implicit in the religion clauses").

but of neutrality. See Wallace, 472 U.S. at 83 (O'Connor, J., concurring).

Strict application of the foregoing principles ensures that the courts do not sanction government subsidization of religion. If every religious exemption from government burdens were construed as an "accommodation" -- even those which did not remove an obstacle to religious practice or belief -- the State could constitutionally exempt religion from all obligations of citizenship, but none of the benefits. Such a naked subsidy of religion would plainly violate the purpose prong of Lemon; as noted above, this Court has indicated that the State may not exempt religion from all governmental burdens without violating the Establishment Clause. Yoder, 406 U.S. at 220 (warning of "the danger that an exception from a general obligation of citizenship on religious grounds may run

afoul of the Establishment Clause"). Therefore, the condition expressed by the majority and Justice O'Connor in Wallace -- that accommodations must facilitate the free exercise of religious practice or belief -- is a critical limiting factor.

Appellants argue that Section 702 promotes free exercise values because it removes governmental interference with religion. However, such an effect is, by definition, always present when the State exempts religion from governmental burdens. If it were sufficient to promote free exercise simply to exempt religion from secular obligations, the limiting language of Wallace -- that an "accommodation" lifts a governmental burden in order to promote the values articulated in the Court's decisions "interpreting the Free Exercise Clause" -- would be superfluous. Moreover, the formulation suggested by Appellants would sanction the exemption of religion

from all governmental burdens.[6] Thus, Congress could pass a statute exempting religion from anti-pollution laws, traffic regulations, and myriad other requirements, reasoning that this promoted free exercise values because it reduced government interference with religion. The reason that Appellants' argument leads to such a result is that it fails to distinguish between exemptions that remove burdens on religious practice or belief, and exemptions -- such as Section 702 -- that merely remove secular burdens from religious organizations. The former promotes free exercise values; the latter is nothing more than a gratuitous benefit for religious organizations.

The foregoing distinction has plainly been recognized by decisions of

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6 As will be demonstrated infra, Appellants' construction of the second and third prongs of Lemon ensures that all religious exemptions would pass constitutional scrutiny.

this Court addressing religious accommodations. Of the religious accommodations cited by the United States (Brief for the United States at 19-20), in each instance the approved religious exemption in fact facilitated free exercise by removing an obstacle to the practice of religion. For example, the exemptions created in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), were constitutionally required by the Free Exercise Clause in order to remove governmental barriers that interfered with the exercise of certain religious beliefs. Similarly, the release from public school classes in Zorach v. Clausen, 343 U.S. 306 (1952), allowed students the opportunity to pursue their religious education, an opportunity that was otherwise restricted by the requirement of full-time attendance at school. And the Sabbatarian exemption from Sunday Closing

laws approved in Braunfeld v. Brown, 366 U.S. 599, 608 (1961)(plurality opinion), facilitated the exercise of religion for those who would otherwise be forced to choose between their livelihood and their religious beliefs. See also United States v. Lee, 455 U.S. 252, 260 & n.11 (1982)(approving statute exempting those who objected on religious grounds to payment of social security); Bowen v. Roy, ____ U.S. ____, ____ n.19, 106 S.Ct. 2417, 2158 n.19 (1986) (opinion of Burger, C.J.) (approving exemption for individuals whose religious beliefs precluded use of social security number); Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918)(approving conscientious objector exemption).[7]

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7 NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979) and St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 788 (1981) were both decided on statutory construction grounds, and in each case there was a suggestion that interference

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On the other hand, the 1972 amendment to Section 702 did not remove any obstacle to the free exercise of religious practice or belief; by definition, it only exempted from Title VII employment which was non-religious in nature. If the Mormon Church could demonstrate a sincerely held religious belief that certain jobs could be performed only by those of the Mormon faith, an exemption from Title VII would promote the free exercise of religion. Such a situation would be analogous to an exemption from the Sunday Closing laws extended to Sabbatarians. By contrast, Section 702 does nothing to remove any impediment to free exercise; it merely removes secular burdens from certain religious organizations. Such an accommodation has a plainly religious

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with Church-run schools could violate the Free Exercise Clause.

purpose, and cannot be sustained under the first prong of the Lemon test.[8]

II. SECTION 702 HAS THE EFFECT OF ABRIDGING THE RELIGIOUS FREEDOM OF OTHERS, AND ADVANCING CERTAIN RELIGIONS AND RELIGIOUS IDEAS OVER OTHERS

Even if Section 702 is viewed as a genuine accommodation, it must nevertheless be invalidated because it has the effect of inhibiting religion. Certain

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8 Although Appellants will undoubtedly point to the property tax exemption upheld in Walz as an accommodation that failed to remove any obstacle to the exercise of religious practice or belief, the exemption sustained in that case was not limited to religion, i.e., it was not a "religious gerrymander." The Court was careful to point out that it was extended to a broad range of non-profit organizations. Walz, 397 U.S. at 673. See Johnson, Concepts and Compromise in First Amendment Religious Doctrine, 72 Cal. L. Rev. 817, 878 (1984)(Walz may have reached a different result if the benefits had been narrowly directed at religion). Moreover, the strong historical basis for tax exemptions for religion -- explicitly relied upon in Walz -- as well as the fact that such exemptions do not burden the religious liberty of others, suggests that such provisions are not analogous to Section 702.

accommodations, such as a Sabbatarian exemption from Sunday closing laws, have no adverse effect on the religious beliefs of others. Therefore, the exclusive religious effect of such accommodations is to lift a governmental obligation from religion, thereby promoting free exercise values. Other statutes, such as Section 702, purportedly accommodate the religious beliefs of some by restricting the religious freedom of others. No case cited by Appellants involved such an accommodation, but the decisions of this Court make clear that a religious accommodation achieved at the religious expense of others cannot be sustained unless constitutionally required by the Free Exercise Clause.[9]

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9 It is true that this Court has stated that "the government's authority to accommodate religion is not limited to the measures required by the Free Exercise Clause . . . ." (Brief for the United States at 17.) None of the cases cited for this proposition, however, involved a statute that accommodated the religious beliefs of some by burdening the religious liberty of others.

Although every accommodation has the effect of advancing religion, Appellants suggest no reason why this Court should relax the converse requirement of the effects prong of Lemon -- that the State may not pass a law that has the effect of inhibiting religion.

A. Section 702 Purportedly Accommodates Religion by Chilling the Religious Liberty of Others

Although this Court has never squarely decided the constitutionality of a statute that accommodates religion at the expense of the religious freedom of others, its decisions indicate that such accommodations would run afoul of the Establishment Clause. For example, in Sherbert v. Verner, 374 U.S. 398 (1963), the Court held that the Free Exercise Clause required that Seventh Day Adventists be excused from the requirement that persons seeking

unemployment benefits be willing to work Saturdays. In rejecting a claim that this accommodation violated the Establishment Clause, the Court observed that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties." Id. at 409. Conversely, in United States v. Lee, 455 U.S. 252 (1982), the Court refused to exempt on religious grounds an employer from the duty to pay social security taxes for its employees. The Court stated that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." Id. at 261. These pronouncements reflect the Court's particular concern that religious accommodations not burden the religious freedom of any individual in the name of promoting the free exercise rights of other groups.

In the case of Section 702, the most obvious burden placed upon religious freedom is that employees of religious organizations may be discharged for refusing to conform their religious beliefs to those of their employer. Compelling individuals to decide between their religious beliefs and gainful employment is a choice this Court has refused to sanction in the Free Exercise context. See Sherbert, 374 U.S. at 404 ("the pressure upon [appellant] to forego [her religious belief] is unmistakable"); Thomas v. Review Board, 450 U.S. 707, 717 (1981) ("coercive impact on Thomas" was the same as in Sherbert). While these cases involved a religious conflict imposed directly by the government, it is settled that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion . . . ." Engel v. Vitale, 370

U.S. 421, 430 (1962); Wallace v. Jaffree, 472 U.S. at 60 n.51; Abington School District v. Schempp, 374 U.S. 203, 221 (1963).[10] This principle reflects no more than the Court's recognition that effects not directly compelled by the State may nevertheless create a significant perception of endorsement of religion, a factor which distinguishes the

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10 Widmar v. Vincent, 454 U.S. 263 (1981), decided on Free Speech grounds, provides another illustrative analogy. In that case the University of Missouri provided meeting facilities for student activities, but prohibited religious groups from utilizing them. The Court found that although the University was under no obligation to provide such a forum, it could not constitutionally exclude religious groups once it had decided to do so, because of the chilling effect of such an exclusion on religious speech. Id. at 267. Just as the chilling effect upon speech in Widmar was sufficient to violate the Free Speech Clause, even though there was no element of governmental compulsion, Section 702's chilling effect upon religion need not be traced to governmental coercion in order to be judicially cognizable under the Establishment Clause. The United States' observation that Section 702 does not result in governmental coercion of religious beliefs (Brief for the United States at 29) is therefore inapposite.

proscriptions of the Establishment Clause from those of other constitutional prohibitions (such as the Free Exercise Clause).

Of course, at some point the effects of governmental action become too attenuated to be of Establishment Clause concern. The means by which this threshold may be defined is to distinguish incidental burdens upon religious freedom from direct burdens. In the case of Section 702, the burden imposed is not merely incidental to the goal the statute purports to achieve; that burden is a necessary consequence of the "benefit" Section 702 bestows upon religious organizations -- allowing them to discriminate against their employees. One commentator cited in both Appellants' briefs compares such a provision with religious exemptions from Sunday Closing laws:

> In contrast, the religious benefit [provided by an

> exemption from Sunday Closing laws] is obtained without regard to whether any injury is suffered by other parties. The injury is incidental to the benefit. Exempting Orthodox Jewish merchants from Sunday Closing laws may cause economic injury to their competitors, but the religious benefit does not depend on the injury.

McConnell, Accommodation of Religion, 1985 Sup. Ct. L. Rev. 1, 38-39 (1985). McConnell concludes that an accommodation whose benefit is dependent upon the sacrifice of the religious freedom of others is unconstitutional. Id. at 37-39. Dean Choper reaches an identical conclusion, again using the example of a Sabbatarian seeking to remain open on Sunday to illustrate a permissible accommodation. Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673, 694-95 (1980). See also Paulsen, Religion, Equality and the Constitution: An Equal

Protection Approach to Establishment Clause Adjudication, 61 Notre Dame L. Rev. 311, 340 (1986) (primary concern is that an accommodation could result "in a violation of the religious liberty of those not so 'accommodated'").[11]

In contrast with Sabbatarian exemptions from Sunday Closing laws, Section 702 effectively requires employees of religious organizations to pay with their own religious liberty for the "accommodation" provided to their employers. The connection between benefit and burden is direct, and the perceived effect that government is favoring the religious freedom of some at the religious expense of others unavoidable. It is

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11 The particular Establishment Clause concern with accommodations that are made at the religious expense of others is that such a direct connection reinforces the perception of State sponsorship of religion. It is one thing if the State accommodates religion, but quite another if the accommodation depends upon a sacrifice of religious freedom by others.

difficult to conceive of an effect that presents a more direct contradiction of the values embodied in the Establishment Clause.

The impact of Section 702 is particularly troublesome because of the nature of the governmental obligation from which religious organizations are exempted -- the prohibition of employment discrimination. Where government exempts religion from taxation (as in Walz), the impact of the state action is less problematic than where the exemption is from a statutory prohibition that safeguards substantial individual rights. In the case of Appellee Mayson, the conclusion that the State has elevated secular benefits for religious organizations over Mayson's individual freedom to exercise his religious beliefs is one that inevitably flows from the intended operation of Section 702.

Moreover, Section 702 results in religious coercion even in the absence of private decisions by religious organizations to discriminate. The moment Section 702 was passed it created a chilling effect upon the religious freedom of every employee of a religious organization. The statute of its own force removed the protection against religious discrimination for all such employees, creating pressure to conform their beliefs to those of their employer, even if the employer had no present intention to practice religious discrimination. The loss of religious liberty is felt even by employees whose present religious beliefs conform to those of their employers, because Section 702 exerts a chilling effect upon the freedom to change one's religious convictions.[12]

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12 Even a significant non-religious burden imposed by a religious accommodation may violate the Establishment Clause. The "conscientious objector" exemption from

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The United States urges that Section 702's religious effects are not properly cognizable under the Establishment Clause because they are "not the result of

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(footnote continued from previous page) military service addressed in United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970) imposed a non-religious burden upon those who were forced to serve in place of persons who invoked a conscientious objector claim. Only by a highly strained reading of the exemption did the Court reach the conclusion that it was not a religious accommodation, avoiding the need to address whether the secular burden upon others rendered the provision unconstitutional. This led commentators to the conclusion that a religiously-based exemption would have violated the Establishment Clause. See Greenawalt, Religion as a Concept in Constitutional Law, 72 Cal. L. Rev. 753, 760 (1984); Choper, Defining Religion in the First Amendment, 1982 U. Ill. L. Rev. 579, 589 (1982). See also Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (statute that sought to accommodate religion by placing a burden on others violates the Establishment Clause); McConnell, Accommodation of Religion, 1985 Sup. Ct. L. Rev. 1, 58 (1985) (excessive secular burden will render religious accommodation unconstitutional). If the imposition of a sufficiently significant secular burden results in an Establishment Clause violation, a fortiori the chilling effect of Section 702 on the religious freedom of individuals renders that provision similarly unconstitutional.

an affirmative grant of authority by Section 702 or any other federal statute." (Brief for the United States at 30.) It concludes that Section 702 merely returned religious organizations to the status quo prior to passage of Title VII, when private employers were free to discriminate on the basis of religion. (Id.) There are two fundamental flaws in this argument.

First, this Court has clearly stated that governmental coercion is not an essential element of an Establishment Clause violation. Engel v. Vitale, 370 U.S. at 430; Wallace v. Jaffree, 472 U.S. at 60 n.51. As amicus has previously discussed, the values protected by the Establishment Clause depend significantly, if not exclusively, upon perception. The perceived effect when Congress simply fails to address religious discrimination is fundamentally different -- for purposes of Establishment Clause analysis -- from the

perceived effect when Congress determines that religious discrimination should be unlawful, yet exempts religious organizations from statutory proscriptions.

Thus, the erroneous construction of the Establishment Clause that the United States offers is the inevitable result of the narrow focus it employs. When religious organizations are viewed in a vacuum, Section 702 appears simply to return them to the status quo prior to 1964. However, when viewed from the broader perspective demanded by the Establishment Clause, it is apparent that the situation after 1972 was radically different from that prior to 1964. In 1964, all private organizations were allowed to discriminate on religious grounds. After 1972, only religious organizations were allowed to do so. The perceived effect in terms of the State's

"establishment" of religion is substantially different.[13]

Moreover, as noted above, an "accommodation" merely exempts religious organizations (or individuals) from certain otherwise applicable governmental requirements. By definition, this returns such organizations to the status quo ante enactment of such governmental requirements. If, as the United States argues, a return to the status quo ante does not produce any judicially cognizable

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13 This factor distinguishes the Establishment Clause from the Equal Protection Clause, and renders Crawford v. Board of Education of Los Angeles, 458 U.S. 527 (1982) inapposite. Nevertheless, even under the Equal Protection Clause a return to the status quo ante may result in a finding of unconstitutionality. See, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967) (repeal of anti-housing discrimination statutes held unconstitutional); Washington v. Seattle School District No. 1, 458 U.S. 457 (1982) (initiative prohibiting the use of busing to achieve integration held unconstitutional). See also Widmar v. Vincent, 454 U.S. 263 (1981) (university under no obligation to provide forum for students, but having done so, may not exclude religious groups).

"effects" under the Lemon test, statutory accommodations will never violate the effects prong of the test; a priori, there will be no effects. Nor would the other two prongs of Lemon ever be violated under the analysis suggested by the United States. A bona fide effort to accommodate free exercise would not violate the purpose prong, and, according to the United States, would "invariably" be less entangling than denying an exemption for religion. (Brief for the United States at 18.)

The result would be that application of the Lemon test to religious accommodations would inevitably result in a finding of constitutionality. Presumably, under the theory advanced by the United States, the State could effectively subsidize religion by exempting religious organizations from all the burdens of citizenship -- while continuing to provide all of the benefits -- without

transgressing the Establishment Clause. Prior decisions of this Court plainly reject such a proposition; indeed, statutory provisions drawn along exclusively religious lines are inherently suspect. See Argument, supra. An interpretation of the Establishment Clause which automatically sanctioned all religious accommodations would render nonsensical this Court's admonition that it "must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause . . . ." Wisconsin v. Yoder, 406 U.S. 205, 220-221 (1972).

The rule that emerges from the foregoing analysis is that an accommodation that provides a benefit to religion, which benefit is dependent upon imposition of a burden on the religious liberty of others, impermissibly has the effect of inhibiting religion. It does not matter whether the

burden is imposed directly by the government, or whether government merely provides a benefit that may only be realized by deprivation of another's religious liberty through the inevitable forces of the private sector. In either case, the effect is to single out certain groups for preferential treatment at the religious expense of others, thereby creating governmental endorsement of the preferred groups, in violation of the Establishment Clause.

B. Section 702 Favors Certain Religions and Religious Ideas Over Others.

Section 702, although facially neutral, has the effect of favoring certain, mainly well-established, religious organizations and beliefs over others. These impermissible effects cannot be dismissed as "incidental" or a mere "disparate impact" on different religions.

They are objectionable because they cut to the heart of the Establishment Clause's concern with neutrality: that government action not favor any religions in their ability to spread their faith.

The premise that governments should be forbidden from favoring any religious sects or beliefs over others predates the republic and is fundamental to our national ideology. "Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally, so long as none was favored over others and none suffered interference." Walz, 397 U.S. at 676-77 (emphasis added); see also Engel v. Vitale, 370 U.S. 421, 425-30 (1962). "[A]n attack founded on disparate treatment of 'religious' claims invokes

what is perhaps the central purpose of the Establishment Clause -- the purpose of ensuring government neutrality in matters of religion." Gillette v. United States, 401 U.S. at 437, 449 (1970); see also Walz, 397 U.S. at 669 ("[t]he basic purpose of these provisions . . . is to insure that no religion be sponsored or favored, none commanded, and none inhibited").[14]

This Court has consistently emphasized that it is impermissible for a state or the federal government to enact a law with the purpose or effect of advancing any religion or set of religious ideas at the expense of others. See, e.g., Everson v. Board of Education, 330 U.S. 1, 15

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14 Recognition that the command of government neutrality among religions lies at the core of the Establishment Clause reveals one of the fallacies in the Mormon Church's attempt to modify the test of Lemon v. Kurtzman, supra, in cases involving "accommodation of religious activities." See Brief for Appellants at 23-26. The test the Church suggests makes no provision for evaluating the neutrality of the challenged governmental act.

(1947) ("[n]either [a state nor the federal government] can pass laws which aid one religion, aid all religions or prefer one religion over another"); Epperson v. Arkansas, 393 U.S. 97, 103-104 (1968) ("[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not . . . promote one religion or religious theory against another").

Appellants will doubtless contend that Section 702 is "neutral" because it applies to any "religious corporation, association, educational institution, or society."[15] But it is settled that the

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15 In this respect, this case is different from Larson v. Valente. There, the challenged statute made "explicit and deliberate distinctions between different religious organizations." 456 U.S. at 247 n.23. Moreover, the history of the statute demonstrated "that the provision was drafted with the explicit intention of including particular religious denominations and excluding others." Id. at 254. The Court held that under such circumstances -- intentional discrimination among religions

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First Amendment commands not only facial neutrality, but also that the effects of government action be neutral among religions.[16] See Gillette v. United

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appearing on the face of a challenged statute -- application of the three-part Lemon test is unnecessary, although even then the Court proceeded to apply the test. Id. at 252-55. But where, as in this case, a facially neutral statute has a direct and significant effect of advancing some religions and religious beliefs over others, application of the "effects" test of Lemon is particularly appropriate.

16 Something of an analogy is provided by this Court's Equal Protection cases. In that context the Court has held that mere facial neutrality will not save a statute the impact of which is invidious discrimination. See, e.g., Hunter v. Erickson, 393 U.S. 385, 391 (1969) ("[a]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority"); Reitman v. Mulkey, 387 U.S. 369, 376 (1967) (invalidating facially neutral state constitutional provision because it "would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment"). Of course the analogy is not perfect because discriminatory purpose as well as effect is required for invalidity in the Equal Protection context (Washington v. Davis, 426 U.S. 229 (1976)), whereas, under Lemon, the Establishment Clause is violated by any law with either an impermissible purpose or effect.

States, 401 U.S. at 450 ("the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact") (emphasis added); Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (plurality opinion of Warren, C. J.) ("[i]f the purpose or effect of the law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect")(emphasis added); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, __, 105 S. Ct. 2194, 2918 (1985) (holding a statute invalid because it had "a primary effect that impermissibly advances a

particular religious practice")(emphasis added).[17]

Nevertheless, it is true that virtually every statute that provides benefits to religion will distribute such benefits unequally among various religious sects. Obviously, amicus does not contend that all such provisions have impermissible effects.[18] However, the non-neutral impact

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17 The requirement that the primary effects of government action be neutral among religions is also consonant with this Court's increasing focus on the role of perception in Establishment Clause analysis. See Argument supra. Such perceptions can, of course, be created just as easily (perhaps more so) by the tangible effects of government action, effects which are experienced by the public firsthand, as by statutory language or legislative purpose. Cf. School District v. Ball, 473 U.S. at ___, 105 S.Ct. at 3226-27; Lynch v. Donnelly, 465 U.S. 668, 692 (1983)(O'Connor, J., concurring).

18 As Justice O'Connor has observed,

> [a] statute that ostensibly promotes a secular interest often has an incidental or even primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the
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> (footnote continued)

of state action is of central concern where it affects the ability of religions to spread their message and expand their memberships. See Zorach v. Clauson, 343 U.S. at 314 ("[t]he government must be neutral when it comes to competition between sects"); Gillette v. United States, 401 U.S. at 454 (statute valid because there could be no argument that it encourages membership in "putatively 'favored' religious organization"). As the Court stressed in Zorach -- in a passage frequently quoted by Appellants -- the Religion Clauses demand "an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its

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state could not criminalize murder for fear that it would thereby promote the Biblical command against killing.

Wallace v. Jaffree, 472 U.S. at 69-70 (O'Connor, J., concurring).

adherents and the appeal of its dogma." 343 U.S. at 313.

Statutes whose effects have a disparate religious impact are plainly of greater Establishment Clause concern than those whose effects are purely secular. See, e.g., Larson v. Valente, 456 U.S. at 246-47 n.6. For example, the tax exemption in Walz provided only certain religions with a secular benefit, but did not implicate the basic concern of the Establishment Clause's insistence on neutrality, because it did not have the effect of increasing membership in favored sects.[19] By contrast, the core concern of the Establishment Clause is implicated where a statute has the direct and primary

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19 The exemption from property taxes involved in Walz would clearly benefit those religious organizations owning much property more than those owning little. But this inequality has only the most attenuated and indirect effect on the relative abilities of religious organizations to compete among themselves for members or otherwise spread their doctrine.

effect of providing some religions or persons holding particular religious beliefs an advantage over others in spreading their doctrine and gaining new members, or conversely, in coercing the continued obedience of their present members.[20] Such non-neutral effects of government action go beyond mere "disparate impact" because the advantage they provide some religions directly disadvantages other, competing religions, thereby violating the Constitution's command that

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20 Although this Court's aid to parochial school cases involve affirmative state-provided benefits, they clearly reflect this distinction between generalized secular benefits, such as bus transportation, school lunches and public health facilities (state provision of which is permissible), and benefits that assist religious schools in indoctrinating religious belief (which are disallowed). For example, in Meek v. Pittenger, 421 U.S. 349 (1975), the Court found no infirmity in provision of "secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school" (id. at 364), but held that government "must be certain . . . that subsidized teachers do not inculcate religion." Id. at 369.

each religion "flourish according to the zeal of its adherents and the appeal of its dogma." Zorach, 343 U.S. at 313.

Applying the foregoing principles to Section 702, it is apparent that the statute cannot be sustained. The enactment of Section 702 substantially and unequally affects the ability of religions to spread their faiths. The statute provides established religious organizations with economic strength a powerful coercive tool for spreading their message, expanding their membership, and compelling obedience that competing churches simply do not have -- the ability to force employees of their secular business holdings to comply with their religious demands or be fired. This non-neutral effect of Section 702 can hardly be dismissed as insubstantial given the enormous financial holdings of many of the larger, established churches in this

country.[21] Indeed, the favoritism that Section 702 affords established religious organizations is graphically evidenced by the list of those organizations which have submitted amicus briefs in the statute's defense.

In the same manner, Section 702 discriminates against religious organizations that do not encourage, or that even abhor, accumulation of worldly wealth. Unlike the Mormon Church,[22] some

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21 The Mormon Church and its affiliates, for example, is a powerful economic force and a significant employer. One recent study of the Mormon Church concluded that "[t]he Church runs a virtual business empire, with assets close to $8 billion by conservative estimates." J. Heinerman & A. Shupe, The Morman Corporate Empire, 76 (1985). The Church controls a major communications conglomerate which includes three television stations and twelve radio stations (id. at 72-75), the largest ranching enterprise in the United States (id. at 119), a huge collection of commercial real estate holdings (id. at 121), and a group of insurance companies (id. at 123-24).

22 Scholars of Mormonism have commented on the theological motivation behind the Church's drive for economic expansion: "As religion

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religions do not believe as part of their theology in accumulation of economic wealth either by the religious organization itself or by its members. Nor do all religions place such emphasis as does the Mormon Church (through the practice of tithing) on transfer of economic wealth from individual members to the organization. Section 702 puts the members of these religions at a distinct disadvantage in competition with religious organizations such as the Mormon Church and its affiliates which stress the accumulation of wealth in the church organization. For only religions that engage in such church-accumulation of economic power can use the Section 702 exemption to coerce the religious choices

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> and as dynamic organization, [the Mormon Church] is dedicated to 'this-worldly' change aimed at establishing a communally owned and operated business empire and a theocratically ruled, unified world society . . . . Thus economic growth is an integral part of Mormon theology." J. Heinerman & A. Shupe, The Mormon Corporate Empire, 77 (1985).

of secular employees. Religions whose beliefs leave wealth in the hands of their members (or who do not qualify as "religious organizations") cannot take similar advantage of their members' economic power.

Thus, Section 702 "effectively distinguishes between 'well-established churches'" with powerful financial resources "on the one hand, and 'churches which are new and lacking in a constituency . . .' on the other hand." Larson v. Valente, 456 U.S. at 247. It upsets the "free competition between religions" (id. at 245) anticipated by the Religion Clauses by making available to religious organizations a competitive instrument -- their power as employers -- which only some sects are able to wield.

Appellants may attempt to dismiss such effects as merely a return to the pre-Title VII status quo. However, as

demonstrated supra, every exemption of religion from governmental obligations may be characterized as having no effects other than a return to the status quo ante, yet this Court has never suggested that such exemptions have no judicially cognizable effects under Lemon. The perception of establishment of religion is far greater when the State legislates in a particular area, yet carves out special exemptions for religion, than when the State simply fails to act at all.

Moreover, Title VII as presently enacted -- including the current version of Section 702 -- gives certain religions a substantial advantage over groups with sincerely held religious beliefs that require discrimination but which do not qualify as "religious organizations." See State by McClure v. Sports & Health Club, Inc., 370 N.W. 2d 844 (Minn. 1985), app. dismissed sub nom. Sports and Health Club

Inc., v. Minnesota, ___ U.S. ___, 106 S. Ct. 3315 (1986) (born-again Christian owners of commercial health spas not entitled to discriminate on religious grounds). Section 702 also places religious organizations whose tenets do not call for a transfer of wealth from the individual to the organization at a substantial disadvantage. Thus, before 1964, all religious groups and organizations were equally at liberty to discriminate in employment. Now, only the economically powerful religious organizations are able to do so, and thereby increase their membership at the expense of other sects.

These effects cannot be dismissed as merely indirect or incidental. They are the primary results of a statute whose purpose is to exempt religious organizations from the otherwise generally applicable prohibition against religious

discrimination in secular employment. That exemption goes to the heart of the Establishment Clause's concern with neutrality -- the insistence that government actions be neutral when they affect the relative abilities of religions to compete in spreading their respective faiths. It is unnecessary for this Court to attempt to assess the magnitude of the competitive advantage which is such a direct and primary result of Section 702. For, as this Court stated in Abington School District v. Schempp, "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" 374 U.S. at 225.

CONCLUSION

The decision of the District Court should be affirmed.

February 20, 1987.

Respectfully submitted,

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Nos. 86-179 and 86-401

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, et al., and THE UNITED STATES OF AMERICA,

Appellants,

v.

CHRISTINE J. AMOS, et al.,

Appellees.

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I, Robert E. Borton, being sworn, state that on this 20th day of February, 1987, three copies of the Brief of the Employment Law Center of the Legal Aid Society of San Francisco as Amicus Curiae in Support of Appellees in the above captioned case were mailed, in envelopes properly addressed and first class postage prepaid, to counsel of record for all

parties herein, to the Clerk of the United States Supreme Court, and to the Solicitor General, as follows:

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I further state that all parties required to be served have been served.

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SWORN TO before me this _____ day of February, 1987

_____